

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
Respondent,)	
v.)	No. SC94295
)	
ANDREW L. LEMASTERS,)	
)	
Appellant.)	

ON APPEAL FROM THE NEWTON COUNTY CIRCUIT COURT
40th JUDICIAL CIRCUIT
THE HONORABLE TIMOTHY W. PERIGO, CIRCUIT JUDGE

BRIEF OF
MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS
IN SUPPORT OF RESPONDENT
AS AMICUS CURIAE

DANIEL K. KNIGHT, #40443
President
Boone County Prosecuting Attorney
705 E. Walnut St.
Columbia, MO 65201
(573) 886-4100
FAX (573) 886-4148
E-mail: dknight@boonecountymmo.org

JASON H. LAMB, #50253
Executive Director
Missouri Office of Prosecution Services
200 Madison St.
Jefferson City, MO 65102
(573) 751-0619
FAX (573) 751-1171
E-mail: Jason.Lamb@mops.mo.gov

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	3
ARGUMENT	4
I. REQUIRING THE BLANKET DISQUALIFICATION OF AN ENTIRE PROSECUTOR’S OFFICE THAT HAS HIRED A FORMER PUBLIC DEFENDER WILL RESULT IN NUMEROUS SPECIAL PROSECUTOR APPOINTMENTS AND WILL HAVE A CHILLING EFFECT ON FUTURE HIRING PRACTICES BY PROSECUTORS ACROSS THE STATE.....	4
CONCLUSION	8
CERTIFICATE OF SERVICE AND COMPLIANCE	9

TABLE OF AUTHORITIES

CASES

State v. Ross, 829 S.W.948 (Mo. banc 1992) 4, 5, 7

Blair v. Armentrout, 916 F.2d 1310 (8th Cir. 1990) 6, 7

STATUTES

Section 56.110, RSMo 5

RULES

Rule 4-1.11 7

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Missouri Association of Prosecuting Attorneys (MAPA), established in 1969, is a non-profit, voluntary association of Missouri's 115 prosecutors, and approximately 300 assistant prosecutors and additional investigators. MAPA strives to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually improve the criminal justice system in Missouri.

This case raises a matter of interest to Missouri's prosecutors as it has the potential to greatly impact the need for special prosecutors and the hiring practices in all prosecutors' offices across the state.

ARGUMENT

REQUIRING THE BLANKET DISQUALIFICATION OF AN ENTIRE PROSECUTOR'S OFFICE THAT HAS HIRED A FORMER PUBLIC DEFENDER WILL RESULT IN NUMEROUS SPECIAL PROSECUTOR APPOINTMENTS AND WILL HAVE A CHILLING EFFECT ON FUTURE HIRING PRACTICES BY PROSECUTORS ACROSS THE STATE.

There was no actual conflict of interest or prejudice in this case when Appellant's former public defender was hired by the Newton County Prosecuting Attorney and screened from any contact with this case. However, Appellant argues that the mere presence of his former counsel in the office of the prosecutor is enough to create an "appearance of impropriety" and requires a reversal of his case with a remand for an appointment of a special prosecutor.

Such a bright line rule would result in numerous blanket disqualifications of local prosecutors. This would wreak havoc on the criminal justice system by requiring numerous special prosecutor appointments, and would have a chilling effect on prosecutors hiring the best trial attorneys from the public defender system.

Appellant relies on this Court's opinion in *State v. Ross*, 829 S.W.948 (Mo. banc 1992) to support to his argument. In *Ross*, the defendant was charged with assault by the prosecutor's office. Two of the assistant prosecutors also worked part-time in a law firm in private practice. The defendant consulted with that law firm about a civil suit, giving rise to an attorney-client relationship between the defendant and the two part-time assistant prosecutors. Additionally, there was no evidence that the prosecutor's office

made efforts to screen the part-time assistant prosecutors from the criminal case. The *Ross* Court observed the appearance of impropriety, found that a presumed conflict of interest existed that was not rebutted, reversed and remanded the case for the appointment of a special prosecutor pursuant to 56.110 RSMo, and set out instructions for preventing future conflicts of interest in cases involving part-time prosecutors.

While *Ross* analyzed a scenario involving part-time prosecutors who were also involved in outside civil practice, the remedy in that case clearly does not comport to the facts in the instant case. Here, the Newton County Prosecuting Attorney has three full-time assistant prosecutors, and the case involves the public defender system which represents the vast majority of criminal defendants in the state of Missouri. Application of that *Ross* remedy to this case will have drastic implications for the criminal justice system as a whole.

Prosecutors' offices across the state hire public defenders from time to time. With the decline of civil jury trials, criminal law offers the most trial experience for new attorneys. Prosecutors and public defenders receive far more trial experience than their civil law counterparts. Prosecutors may hire public defenders who have proven themselves to be worthy trial opponents, not only because they are familiar with the local judicial system but because they have extensive trial experience that cannot be matched by other candidates.

The Newton County Prosecuting Attorney's office is a third-class county, and is representative of many prosecutors' office across the state.¹ Here, the prosecutor's office screened the former public defender and did not allow her access to any of the cases she previously worked on. There is no other course of action that the prosecutor's office could have taken short of not hiring her in the first place. If that procedure is not deemed sufficient in this case, then it cannot be sufficient prosecutors' offices in future cases. Therefore, prosecuting attorneys across the state will be forced to re-evaluate their hiring practices and may be less likely to hire public defenders going forward. If the mere hire of a public defender means that the prosecutor will have to recuse on all public defender cases, then they may unfortunately be forced to turn to other candidates to hire.

Also, if a former public defender's knowledge of a case is imputed to her new prosecutor's office even with a proper screening method, then by that logic her knowledge is also imputed to her former co-workers in the public defender system, who also may have subsequently gone to work in prosecutors' offices. Therefore, if a prosecutor's office is disqualified because of her imputed knowledge, then any special prosecutor – whether it be another prosecuting attorney or the attorney general – must not have any former public defenders on staff who worked in the system at the same time as the attorney in question, for they too would have imputed knowledge that would disqualify that office from acting as special prosecutor.

¹ As of the filing of this brief, 67 counties will be classified as full-time effective January 1, 2015. While three of those represent the major metropolitan jurisdictions, and a handful of others are urban or collar counties, the vast majority are small, rural third-class counties with perhaps only one to three assistant prosecutors.

In *Blair v. Armentrout*, 916 F.2d 1310 (8th Cir. 1990), the United States District Court addressed this issue on point. In that case (which Judge Holstein pointed to in his dissent in *Ross*) the defendant attempted to disqualify the entire Missouri Attorney General's office (acting as special prosecutor) due to the fact that his former defense counsel now worked for the Attorney General's Office. The *Blair* Court refused to disqualify the entire Attorney General's Office, but observed that screening of the individual attorney in question could be sufficient.

Indeed, as the Court of Appeals ruled in the underlying opinion, the proper analysis in this case is to apply Rule 4.1-11, which governs conduct by government attorneys. The attorney in question here was a government attorney when she was employed by the public defender, and also when she subsequently was employed by the Newton County Prosecuting Attorney. The comments to Rule 4-1.11 state "the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government." *Rule 4.1-11 cmt. 4.*

This Court should clarify the *Ross* case, solidify its own standards relating to government attorneys as set forth in the Rules of Professional Responsibility, and make it clear that there is no automatic disqualification of the prosecutor's office due to the status of a former public defender on staff.

CONCLUSION

The mere presence of a former public defender who served as Appellant's counsel in the office of the prosecutor is not sufficient to require a reversal of his case with a remand for an appointment of a special prosecutor.

A bright line rule as requested by Appellant would result in blanket disqualifications of local prosecutors. This would require numerous special prosecutor appointments, and would have a chilling effect on prosecutors hiring the best trial attorneys from the public defender system. The Newton County Prosecuting Attorney's office complied with the existing ethical rules relating to government attorneys. For these reasons, appellant's application for relief should be denied.

Respectfully submitted,

/s/ Jason H. Lamb

DANIEL K. KNIGHT, #40443
President
 Boone County Prosecuting Attorney
 705 E. Walnut St.
 Columbia, MO 65201
 (573) 886-4100
 FAX (573) 886-4148
 E-mail: dknight@boonecountymo.org

JASON H. LAMB, #50253
Executive Director
 Missouri Office of Prosecution Services
 200 Madison St.
 Jefferson City, MO 65102
 (573) 751-0619
 FAX (573) 751-1171
 E-mail: Jason.Lamb@mops.mo.gov

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE AND COMPLIANCE

I, the undersigned, hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 1,880 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2014 and;
2. That the electronic file has been scanned and found to be virus-free; and
3. That a true and correct copy of the foregoing was sent through the e-filing system this 4th day of November, 2014 to all counsel of record.

Respectfully submitted,

/s/ Jason H. Lamb

JASON H. LAMB, #50254
Executive Director
Missouri Office of Prosecution Services
200 Madison St.
Jefferson City, MO 65102
(573) 751-0619
FAX (573) 751-1171
E-mail: Jason.Lamb@mops.mo.gov